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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

~~MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND~~ SUPPLEMENTAL BRIEF FOR PETITIONER

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tatutes:

rk. Stat. Ann. §43-1921 (1964 Repl. vol.) 7
rk. Stat. Ann. §43-1922 (1964 Repl. vol.) 7

IN THE

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No. 13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Motion for Leave to File Supplemental Brief

Pursuant to Rule 41 (5), (6) of this Court, petitioner Maxwell respectfully asks special leave to file the appended Supplemental Brief.

Certiorari was granted in this case on December 16, 1968, limited to two questions:[1]

"2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by stand-

---

[1] These were questions 2 and 3 of the Petition for a Writ of Certiorari. By a separate motion filed contemporaneously with the present one, petitioner is requesting that the Court enlarge the scope of its grant of *certiorari* to include consideration also of Question 1 of the Petition, relating to petitioner's claim that Arkansas juries have discriminated on grounds of race in exercising their discretion to sentence men convicted of the crime of rape to death.

ards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?

"3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination on the guilt issue, violates the Fifth and Fourteenth Amendments?"

The case was argued on March 3 and 4, 1969, by counsel for petitioner, for respondent, and for the State of California as *amicus curiae*. California urged orally (as it had previously in its brief *amicus curiae*) that the issues on which *certiorari* had been granted ought not to be decided. Rather it contended that the case should be disposed of (if the facts warranted) upon the ground that the jury which condemned petitioner to die had been selected in violation of the retroactive ruling in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). The Court requested and received, without objection of the parties, a transcript of petitioner's trial that included the *voir dire* examination of prospective jurors.

At the argument on March 4, petitioner took the position that this Court should not refuse to decide the issues on which it had granted *certiorari*, and which remained squarely and properly presented by this case, simply because petitioner's death sentence might also be invalid under *Witherspoon*. Those issues remained vital to petitioner and to hundreds of other death-sentenced men across the Nation, he argued, even though petitioner's present sen-

tence to death by electrocution should be set aside by force of the *Witherspoon* rule.

On May 26, 1969, this Court ordered the case restored to the calendar for reargument on October 13, 1969.

Events since the first argument of this case in March of 1969 seem to us relevant to this Court's appreciation of the proper place of the *Witherspoon* issue in the present litigation. It is the purpose of petitioner's Supplemental Brief to discuss the implications of those events, which include this Court's decision of *Boulden* v. *Holman*, 394 U.S. 478, on April 2, 1969, and numerous opinions of state and lower federal courts rendered or reported since March of 1969, considering *Witherspoon* and the other issues presented by petitioner's Petition for Certiorari.

We have delayed the preparation of this Supplemental Brief until September in order to permit inclusion in it of references to as many relevant 1969 state and lower federal decisions as could be found. We seek to file it at this time so that respondent and the *amicus curiae* may have a month within which to reply prior to reargument. For these reasons, we now request leave of the Court to file the appended Supplemental Brief.

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WILLIAM L. MAXWELL,

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—v.—

O. E. BISHOP, Superintendent of Arkansas State Prison,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner contends herein that his death sentence is constitutionally invalid under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). (Part I, *infra*.) For this reason, the judgment below, which denies him the last available judicial relief against the execution of that sentence by electrocution, cannot properly be affirmed by this Court. (Part II, *infra*.) However, the invalidity of petitioner's sentence under *Witherspoon* does not require the Court—and should not persuade the Court—to decline to consider petitioner's other challenges to the Arkansas capital sentencing procedure which has authorized his imprisonment under an unconstitutional sentence of death for more than seven years and to which he will be subjected, again unconstitu-

tionally, on any retrial occasioned by a *Witherspoon* disposition here. Those other challenges are not rendered moot by *Witherspoon;* and their determination by this Court is, if possible, more important to the proper and constitutional administration of justice in capital cases today than it was when the Court first agreed to consider petitioner's claims on *certiorari* in December, 1968. (Part III, *infra.*)

I.

Petitioner's Death Sentence Is Invalid Under *Witherspoon.*

A. *Facts Relevant to the* Witherspoon *Issue*

Fifty-five veniremen were examined in the course of selecting the twelve jurors who sentenced petitioner to die.[2] Of the 43 veniremen excused from service on the jury, 12 were excused on peremptory challenge by the defense,[3] 7 were challenged peremptorily by the prosecution,[4] 17 were

---

[2] Two panels of veniremen were called: the regular panel, having 31 veniremen, and a special panel of 33 (18 of whom had previously been qualified and 15 of whom had not). Of the 64 veniremen thus brought into the courtroom, 55 were interrogated and excused or passed on the *voir dire* before the process of selecting a jury was completed. Tr. 108-238; see particularly Tr. 108-109. [Tr. here and hereafter refers to the transcript of petitioner's trial in the Circuit Court of Garland County, Arkansas, March 19–April 5, 1962, which is included in and paginated as a part of the record on petitioner's direct appeal to the Arkansas Supreme Court, Criminal No. 5057, handed up to this Court on the first argument of the case here, March 4, 1969.]

[3] Veniremen Groom (Tr. 124), McClard (Tr. 153), Madden (Tr. 170), Johnson (Tr. 170), Maddox (Tr. 170), Thomas (Tr. 170), Bledsoe (Tr. 199), Rephan (Tr. 205), Raymond (Tr. 205), Lowrey (Tr. 209), Miller (Tr. 220), Gibbs (Tr. 230).

[4] Veniremen Graham (Tr. 136), Ross (Tr. 154), Cheatham (Tr. 186), Wesson (Tr. 195), King (Tr. 201), Thomas (Tr. 214), Quinn (Tr. 226).

d for cause by the court on grounds other than op-
on to capital punishment,[5] and 7 were excused for
by the court because of their opposition to capital
ment.[6] (The defense thus exhausted all twelve of the
ptory challenges allowed it under Arkansas proce-
Ark Stat. Ann. §43-1922 (1964 Repl. vol.); see Tr.
hile the prosecution failed to use only three of its
ble ten peremptories, Ark. Stat. Ann. §43-1921 (1964
vol.).[7])

iry on the *voir dire* concerning the veniremen's at-
s toward capital punishment was ordinarily made by
osecutor. The questions he asked varied somewhat
enireman to venireman. But, whenever any answer
ting any sort or degree of opposition to the death
y was received, the prosecutor made his challenge
use which was thereupon granted by the Court with-
rther inquiry.

relevant portions of the *voir dire* examination of
ven jurors excused for opposition to the death penalty
t out in Appendix A to this brief. We summarize
ere:

---

iremen Wafford (Tr. 111), Rather (Tr. 113), Calcote (Tr.
), Elliott (Tr. 114-115), Lowrey (Tr. 115), Rhiddlehoover
5-116), Reed (Tr. 131), Buchannan (Tr. 132), Rainwater
4), Rowell (Tr. 155), Weston (Tr. 162), Dean (Tr. 162),
(Tr. 164), Green (Tr. 179-180), Robertson (Tr. 205), Jackson
7), Douglas (Tr. 223).

iremen McCleary (Tr. 117), Wade (Tr. 159), Hagy (Tr.
troupe (Tr. 171), Breland (Tr. 178-179), Adams (Tr. 181),
ms (Tr. 195-196).

e prosecutor's use of peremptories followed the common
n: of the seven veniremen he excused (note 4, *supra*) six
Negro (invariably after only cursory questioning, except
pursuit of a possible ground of challenge for cause seemed
to save him use of a peremptory) and one was a white man
Tr. 154), whose half-brother appears to have had some sort
in with the prosecutor.

(1) *Venireman McCleary*: After the court had questioned the first box of twelve veniremen on subjects other than capital punishment and had excused several for cause, the prosecutor was invited to inquire. He asked the first remaining venireman, Mr. Kimball, "if the evidence convinced you beyond a reasonable doubt at the conclusion of this trial that the defendant was guilty, that you thought a death sentence was justified, do you have any conscientious scruples that prevent your imposing such a sentence?" Mr. Kimball said no. The prosecutor then asked Mrs. Kanada "if you were convinced beyond a reasonable doubt at the conclusion of this trial that the defendant was guilty, that you thought a death sentence was justified, would you have any conscientious scruples *about imposing* the death sentence [emphasis added]?" Mrs. Kanada said no. The prosecutor pursued:

> "Q. Mr. Groom, you have heard the question I just asked, do you entertain any such conscientious scruples *against* the death sentence [emphasis added]?"
>
> "A. No.
>
> "Q. Mr. Martin, do you entertain any such scruples?
>
> "A. No.
>
> "Q. Mr. Beavers?
>
> "A. No, not at this point?
>
> "Q. Do you entertain *any* conscientious scruples *about imposing* the death penlaty [*sic*] [*emphasis added*]?"
>
> "A. No.
>
> "Q. Mr. Rima?
>
> "A. No.
>
> "Q. Mr. McCleary?
>
> "A. Yes, I am afraid I do.
>
> "Q. I submit, your Honor, that Mr. McCleary should be excused.

"THE COURT: Alright, [*sic*] Mr. McCleary.

"LET THE RECORD SHOW 1 EXCUSED, AGAINST DEATH SENTENCE." (Tr. 116-117.)

(2) *Venireman Wade*: The prosecutor inquired:

"Q. Mrs. Wade, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you felt the crime he committed was proved beyond a reasonable doubt and was so abhorrent as to justify the death penalty would you have any conscientious scruples against the death penalty?

"A. I would not sentence the death penalty.

"MR. WHITTINGTON: I submit, your Honor, that Mrs. Wade should be excused.

"LET THE RECORD SHOW MRS. WADE EXCUSED, DOES NOT BELIEVE IN THE DEATH PENALTY." (Tr. 159.)

(3) *Venireman Hagy*: The prosecutor asked:

"Q. Mrs. Hagy, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you thought that this crime was so abhorrent as to justify the death penalty would you entertain any conscientious scruples about inflicting the death sentence?"

"A. I don't believe in capitol [*sic*] punishment.

"Q. You do not believe you could return a verdict of capitol [*sic*] punishment?

"A. No sir, I don't believe in capitol [*sic*] punishment.

"THE COURT: You will be excused.

"LET THE RECORD SHOW MRS. HAGEY [*sic*] EXCUSED, DOES NOT BELIEVE IN CAPITOL [*sic*] PUNISHMENT." (Tr. 160.)

(4) *Venireman Stroupe*: The prosecutor asked:

"Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capitol [*sic*] punishment that *might* prevent you from returning such a verdict [*emphasis added*]?

"A. *I think* I do [*emphasis added*].

"MR. WHITTINGTON: I submit, your Honor, that the juror should be excused.

"THE COURT: You may be excused.

"LET THE RECORD SHOW MRS. STROUPE EXCUSED, AGAINST THE DEATH PENALTY." (Tr. 171.)

(5) *Venireman Breland*: The prosecutor asked:

"Q. Mrs. Breland, if you were convinced that the defendant was guilty beyond a reasonable doubt at the end of this trial and that his actions had been so shocking and abhorent [*sic*] as to warrant the death penalty *do you have any feelings* about capitol [*sic*] punishment *to prevent* your returning such a verdict [*emphasis added*]?

"A. Yes, *I think* I do [*emphasis added*].

"MR. WHITTINGTON: I submit, your Honor, that Mrs. Breland be excused.

"THE COURT: You may be excused.

"LET THE RECORD SHOW MRS. BRELAND EXCUSED, DOES NOT BELIEVE IN CAPITOL [*sic*] PUNISHMENT." (Tr. 178-179.)

enireman Adams: The prosecutor asked:

Q. Mr. Adams, do [*you*] have any feeling concern-
capitol [*sic*] punishment that would prevent you
nake you have any feelings about returning a death
ence if you felt beyond a reasonable doubt that the
endant was guilty and that his crime was so bad as
nerit the death sentence [*emphasis added*]?
A. No, I don't believe in capitol [*sic*] punishment.

"THE COURT: You will be excused Mr. Adams.
"LET THE RECORD SHOW MR. ADAMS
XCUSED, DOES NOT BELIEVE IN CAPITOL
sic] PUNISHMENT." (Tr. 181.)

enireman McAdams: The prosecutor asked:

Q. Mr. McAdams, do you have any conscientious
uples against capitol [*sic*] punishment?
A. I don't have scruples, I have convictions.
Q. What are they? A. I am against capitol [*sic*]
ishment.

"THE COURT: You will be excused, Mr. Mc-
dams.
"LET THE RECORD SHOW MR. McADAMS
XCUSED, AGAINST CAPITOL [*sic*] PUNISH-
IENT." (Tr. 195-196.)

instructive to compare the summary dismissal of
ven prospective jurors with the interrogation of
nan Rephan, set out in Appendix B, *infra*. Mr.
indicated some uncertainty when asked whether he
nfer guilt from the defendant's failure to take the
Thereafter he was informed once by the prosecutor
ee times by the court that the court would instruct
y that it could not hold against the defendant his

failure to take the stand; and the court pressed the specific inquiry: "would you substitute your feelings and your opinion for the instruction of the Court or would you be guided by the Instructions of the Court?" (Tr. 168.) "In other words, you would not substitute your opinion or feelings against what the Court told you the law was?" (Tr. 169.) Upon Venireman Rephan's representation that he "would abide by the law" (*ibid.*), he was qualified as a juror.[8] Yet not one of the veniremen who expressed uncertainty on the subject of the death penalty was instructed that Arkansas law required him to consider the imposition of that penalty upon one found guilty of the crime of rape; not one was asked—with or without the benefit of such an instruction—whether he could "subordinate his personal views to what he perceived to be his duty to abide by his oath and to obey the law of the State." *Witherspoon* v. *Illinois*, 391 U.S. 510, 514-515 n. 7 (1968).

B. *Application of the* Witherspoon *Rule to This Record*

We think the conclusion inescapable that the process of selecting the jury which condemned petitioner to die violated the rule announced in *Witherspoon*.

The holding in the *Witherspoon* case—which this Court expressly declared to be "fully retroactive" (391 U.S., at 523, n. 22)—invalidates all but a narrow form of death-qualification procedure,[9] carefully and meticulously described in the Court's opinion.[10] That holding invalidates

[8] The defense later struck him peremptorily (Tr. 205).

[9] The question of the constitutionality of that narrow form of death-qualification was expressly reserved in *Witherspoon*, a point which the lower courts have altogether ignored. See note 25 *infra*.

[10] We are not unaware that the lower courts have generally refused to give this effect to *Witherspoon*, a matter with which we deal in Appendix C, *infra*. We, however, here take the *Witherspoon*

the systematic exclusion of prospective jurors scrupled against the death penalty "on any broader basis" (391 U.S., at 522, n. 21) than one which excuses "only veniremen who . . . [make] unmistakably clear (1) that they would *automatically* vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" (391 U.S., at 522 n. 21, emphasis in original.) Thus, to escape the explicit prohibition of *Witherspoon,* a practice of excuses for cause on account of scruples against the death penalty must allow a juror to serve unless he "states unambiguously" (391 U.S., at 515-516, n. 9) on his *voir dire* that his attitudes fall within one or the other of two criteria: (1) that his opposition to the death penalty is such that he cannot sit as a fair and impartial trier of the issue of the defendant's *guilt or innocence* (391 U.S., at 522, n. 21), and, in this aspect, he cannot "subordinate his personal views to what he . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State" (391 U.S., at 514-515, n. 7; see also 391 U.S., at 515-516, n. 9); or (2) that he is irrevocably committed against and would not consider voting for the death penalty in any case, regardless of the facts and circumstances that might appear at the trial (391 U.S., at 522, n. 21), and again, in this aspect, he cannot "subordinate his personal views to what he . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State" (391 U.S., at 514-515, n. 7). These constitutional rules were reaffirmed in similarly precise language in *Boulden* v. *Holman,* 394 U.S. 478, 482 (1969):

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opinion to mean exactly what it says—an approach that seems fully justified by the obvious care with which that opinion was written.

> ". . . 'The most that can be demanded of a veniremen in this regard,' we said [in *Witherspoon*], 'is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. . . .' . . . We made it clear that '[u]nless a veniremen states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.' . . . ."

At petitioner Maxwell's trial, no inquiry was made of any juror excluded because of his views toward capital punishment as to whether those views would affect in any manner or degree his ability to find the defendant *guilty*. Under Arkansas procedure, as under the Illinois procedure considered in *Witherspoon*, a guilty verdict would not inevitably entail the death penalty, and for this reason (if for no other) "it simply cannot be assumed" that a juror conscientiously opposed to the death penalty would thereby be unfitted to deliberate fairly on the question of guilt or innocence. Concern for qualifying the jury to decide the guilt issue—one of the two grounds reserved in *Witherspoon* as a possible[11] exception to the strictures of that decision—therefore must be put wholly out of account as a potential justification for what Arkansas has done here.[12]

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[11] See note 9 *supra*.

[12] For this reason, we do not explore herein the questions of the validity of this justification or of its limitations if valid.

As for the second *Witherspoon* reservation—exclusion of prospective jurors who "state unambiguously" and thus make "unmistakably clear" that they could never vote for the death penalty in any case and would decline to follow the law of the State obliging them to consider such a penalty—we think it evident that no venireman excused in petitioner's case expressed anything approaching such a categorical attitude:

(1) Venireman McCleary was interrogated at the conclusion of the questioning of a series of prospective jurors relative to scruples against the death penalty. The first juror in the series was asked whether, if he found the defendant guilty beyond a reasonable doubt and thought a death sentence justified, he had "any conscientious scruples that prevent your imposing such a sentence?" (Tr. 116.) We think that an affirmative answer to this question could not validly support exclusion under *Witherspoon,* for several reasons. First, although the scruples inquired about are described as those that "prevent" a death verdict, it is not made clear to the juror whether "prevent" means absolutely to preclude, or rather merely to hinder, to hamper, to impede or to make difficult the return of a death verdict.[13] Second, the question is very far from asking whether the juror is committed against a death verdict in *any and every case,* regardless of the evidence or circumstances. Third, no effort is made by the prosecutor or the court to explain to the juror that his duty as a juror under the law of Arkansas is to consider imposing the death penalty upon con-

[13] Cf. *People* v. *Williams,* 71 A.C. 638, 654-656, —— Cal. 2d ——, —— P. 2d —— (1969).

viction for the crime of rape, and then to inquire whether he could "subordinate his personal views [on capital punishment] to . . . [this] duty," 391 U.S., at 514-515, n. 7. Compare the inquiry pressed in the case of Venireman Rephan, who indicated that he might hold against the defendant his failure to take the stand, pp. 11-12 *supra;* Appendix B, *infra.*

But, in any event, this was not the question ultimately asked of Venireman McCleary. Subsequent phrasings of the inquiry put to jurors following the first and preceding McCleary watered down the definition of scruples from those "that prevent your imposing . . . [a death] sentence" to "scruples *about imposing* the death sentence" [emphasis added], to "*such* conscientious scruples *against* the death sentence" (referring to the previous questions) [emphasis added]. When a venireman gave less than an unequivocal "no" to this form of the question, he was asked: "Do you entertain *any* conscientious scruples *about imposing* the death penalty [*sic*]" [emphasis added]. It was following this formulation—which plainly asks no more than whether the venireman has "general objections to the death penalty or . . . conscientious or religious scruples against its infliction" (*Witherspoon*, 391 U.S. at 522, as quoted in *Boulden* v. *Holman*, 394 U.S., at 481)—that the prosecutor called out the names of several successive veniremen including McCleary. McCleary responded "Yes, I am afraid that I do," and was forthwith excused for cause. (Tr. 116-117.)

(2) Venireman Wade was asked whether, if convinced of guilt beyond a reasonable doubt and that the crime was so abhorrent as to justify a death verdict

she "would . . . have any conscientious scruples against the death penalty?" She replied: "I would not sentence the death penalty," and was immediately excused. (Tr. 159.) Wade is the only one of the seven veniremen excused for scruples whose exclusion could arguably come within shooting distance of the *Witherspoon* reservation. But we submit that her expression cannot support her exclusion as a juror who made "unmistakably clear" she would not consider a death verdict.

First, like the question put to the first juror in the *McCleary* series, *supra*, the question asked of Wade—and, necessarily, her response—did not address the issue whether she could *under no circumstances in any case* vote for death. This is particularly significant because Wade replied not that she *could* not impose the death sentence, but that she *would* not. *Witherspoon* made quite explicit that a juror cannot be expected to swear that he *would* impose a death sentence. 391 U.S., at 522 n. 21. Moreover, no more than any other venireman was Wade instructed that the law of Arkansas obliged her, as a juror, to consider imposition of the death penalty. She was not asked whether she was able to subordinate her personal feelings to this State-imposed duty. (See discussion at p. 13 *supra*.) She was merely excused for cause because she expressed her feelings—uninstructed and of uncertain strength—that she would not vote for the defendant's death.

A further consideration, too, condemns her exclusion. Because this case was tried long prior to *Witherspoon*, it cannot be assumed that the trial judge inter-

preted Wade's response within the framework of the constitutional standards announced by that decision, or that he found her to be disqualified consonantly with those standards. To the contrary, the court's summary dismissal of every juror who expressed the slightest reservations concerning the death penalty—most of whom were palpably *not* disqualified by *Witherspoon* standards—demonstrates that his ruling on the prosecutor's challenge to Wade was made pursuant to constitutionally impermissible standards. For this reason alone, Wade's exclusion was improper; this Court cannot now, obviously, sustain the trial judge's determination of an issue that he never determined. Cf. *Rogers* v. *Richmond*, 365 U.S. 534 (1961). Petitioner was entitled to be tried by a jury from which veniremen were not excluded "on any broader basis" (*Witherspoon*, 391 U.S., at 522 n. 21; *Boulden* v. *Holman*, 394 U.S., at 482) than *Witherspoon* countenanced. Mrs. Wade, like her compeers, was excluded on a demonstrably broader basis.

(3) Venireman Hagy was asked whether, if convinced of guilt beyond a reasonable doubt and that the crime was so abhorrent as to justify a death verdict, she "would entertain any conscientious scruples about inflicting the death sentence?" She replied "I don't believe in capitol [*sic*] punishment," and was then asked: "You do not believe you could return a verdict of capitol [*sic*] punishment?" She said: "No sir, I don't believe in capitol [*sic*] punishment." (Tr. 160.)

Apart from the several considerations that we have advanced in connection with the exclusion of Venire-

mán Wade, *supra*, Mrs. Hagy was unconstitutionally excluded. There is not the slightest indication in her responses of the nature or strength of her view twice stated as "I don't believe in capitol [*sic*] punishment," or of the implications of that view for her performance as a juror. The prosecutor's second question to her simply assumed the equation of belief against capital punishment with a belief that the juror could not return a capital verdict. If her reply "No sir," to this question—coupled with an exact repetition that she didn't "believe in" the death penalty—meant anything "unmistakably," it meant only that she accepted this equation by the prosecutor, which was not condemned by the court, as under *Witherspoon* it obviously must be. *See* 391 U.S., at 516 n. 9; *Boulden* v. *Holman*, 394 U.S., at 482; *id.*, at 483-484: "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

(4) Venireman Stroupe was excluded for saying that she *thought* she had conscientious scruples about capital punishment that *might* prevent her from returning a death verdict. (Tr. 171.) The inconsistency of this exclusion with *Witherspoon* requires no discussion.

(5) Mrs. Breland was excluded because she *thought* she had *feelings "to prevent"* her returning a death verdict. (Tr. 178-179.) We have discussed at p. 15 *supra* the impermissible ambiguity inherent in a question referring to scruples "that prevent" a death ver-

dict. The still weaker formulation in the question asked Breland, "any feelings . . . to prevent" returning a death verdict, is evident. Even a categorical answer to that form of question would not support exclusion under *Witherspoon*. But Mrs. Breland replied only that she thought she had such feelings. No further inquiry was directed to determining what she would think if the meaning of the question asked her were clarified and corrected, and her duty as a juror explained.

(6) Mr. Adams was asked whether he had any feeling concerning capital punishment that would prevent him *or would make him have any feelings about returning a death sentence*. He replied: "No, I don't believe in capitol [*sic*] punishment." (Tr. 181.) He thus established unmistakably that (a) he did not believe in the death penalty; and (b) this feeling would make him have some feelings about returning a death sentence. His exclusion is a plain violation of *Witherspoon*.

(7) So was the exclusion of Venireman McAdams, who said only that he had convictions, namely: "I am against capitol [*sic*] punishment." (Tr. 195-196.)

Thus we conclude that, in selecting the jury which condemned petitioner Maxwell to die, the State of Arkansas failed to conform to the requirements of *Witherspoon*; and accordingly his "death sentence cannot be carried out . . . ." *Witherspoon*, 391 U.S., at 522 n. 21, quoted in *Boulden* v. *Holman*, 394 U.S., at 482.

In reaching this conclusion, we have not ignored the numerous opinions of lower courts rendered since *Wither-*

spoon which purport drastically to curtail the operation of that decision. In Appendix C to this brief, *infra*, we shall have occasion to catalogue those opinions and to describe the full extent of their obstruction of this Court's considered and carefully articulated holding. Suffice it to say here that most of the rules developed in the wake of *Witherspoon* to avoid its force have no possible application on the present record—for example, the rule denying relief to a death-sentenced man if the number of veniremen excused in violation of *Witherspoon* is less than the number of peremptory challenges remaining unused by the prosecution at the conclusion of selection of the jury (see p. 16a *infra*); or the rule permitting a trial judge who is supposed to have conducted his *voir dire* examination *generally* in conformance with the requirements of *Witherspoon* irreversibly to exclude particular veniremen in violation of those requirements, upon the reasoning that appellate courts will not displace trial judges in the interpretation of particular jurors' responses on *voir dire* (see pp. 14a-15a *infra*).

We conceive only three among the post-*Witherspoon* doctrines of the lower courts that could be interposed to deny petitioner Maxwell relief from his unconstitutional sentence of death; and each of the three is insubstantial:

(A) The "different atmosphere" doctrine of *People v. Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968), and cognate cases (p. 12a *infra*), would limit the *Witherspoon* holding to its most adventitious circumstances. Specifically, these cases attribute the decision in *Witherspoon* to the manner in which the *voir dire* examination in that particular case was conducted, namely, by hurriedly and deprecatorily dismissing all

"conscientious objectors" at the outset. Cases in which the same wholesale exclusion is worked with less dispatch and more decorum are said to present a "different atmosphere" and hence to be distinguishable. We need not pause to examine the intrinsic merit of this distinction, whose least effect would be to reduce nine-tenths of the carefully written *Witherspoon* opinion to purposeless and inexplicable maundering. For the distinction, if ever available, cannot survive *Boulden* v. *Holman.*

(B) A related doctrine would hold that a death sentence need not be vacated where only a few veniremen have been improperly excluded by *Witherspoon* criteria, since some few exclusions without more do not really distort the representative character of the jury which it was *Witherspoon's* purpose to assure. This reasoning has been adopted by some courts and rejected by others. (See pp. 15a-16a *infra.*) It is, we think, indefensibly wrong.

Trial juries consist of only twelve jurors, and can never be truly "representative" of a community in any other sense than that the procedure used to select the men and women who will sit in the box does not exclude or discriminatorily limit the possibility of participation of any identifiable population group. Any procedure, practice or policy which systematically excludes an identifiable group makes the juries selected under it unrepresentative,[14] whether one, or seven,[15] or

[14] Of course, some systematic exclusions—such as occupational exemptions in proper cases—may not result in constitutionally impermissible unrepresentativeness. But *Witherspoon* holds that the exclusion of jurors opposed to capital punishment does affect that result.

[15] As here.

thirteen[16] or a hundred veniremen of the systematically excluded class actually appear on the panel and are thrown out by operation of the procedure. In petitioner's case, seven veniremen having attitudes toward the death penalty which brought them under the rule of *Witherspoon* appeared and might have served. Every one was excluded, on that constitutionally impermissible ground, as a matter of state practice directed specifically to excluding them. The luck of the draw might have produced more or fewer; no matter; Arkansas' death-qualification practice as it was employed at petitioner's trial excluded them all. It is this practice which *Witherspoon* holds invalid, for the obvious and irrefutable reason that its design and necessary effect is to deny a capital defendant's right to have on his trial jury whatever number of members may be put there by chance from out of any population group which the State cannot legitimately exclude.

We submit it is ridiculous to suppose that this Court would countenance for one moment the exclusion by a trial judge, for cause, of a single Negro juror on the stated ground that he is a Negro, although by chance he was the only Negro actually to appear on the venire and suffer exclusion on that general ground. Negro defendants[17] are entitled to have their juries selected by a process that does not exclude *any* Negro jurors on account of race; and, for the same reason, capital defendants are entitled under *Witherspoon* to have their juries selected by a process that does not

[16] As in *Boulden* v. *Holman*.

[17] And perhaps white defendants—a point which it would be diverting to discuss herein.

exclude *any* jurors on account of general objections to the death penalty. Because of the practical realities of the random system by which venires are drawn—only generally and as a procedural matter approximating representativeness—and also because of the practical realities of the manner in which jurors function—every one affecting in an uncertain measure the deliberations of all—there is no room under the Constitution for a *de minimis* doctrine relative to forbidden systematic exclusion. Thus we need not labor the obvious point that seven exclusions in selection of a jury of twelve could not, by any conceivable logic, be *de minimis*.

(C) Some courts have taken the view, apparently always as an alternative ground of decisions sustaining the exclusion of jurors forbidden by *Witherspoon*, that the defendant did not object to the exclusion, or did not pursue exhaustive examination of the jurors excluded, or did not exhaust his peremptory challenges and by that means express his dissatisfaction with the jury. (See pp. 16a-17a *infra*.) Petitioner's trial counsel did exhaust his peremptories; but he did not object to the excuse for cause of scrupled jurors, nor did he add his own inquiries to the constitutionally inadequate ones of the prosecutor that preceded each such excuse. Neither did Witherspoon's trial counsel, nor Boulden's; so those decisions are amply dispositive of this point. Certainly petitioner was not required to anticipate this Court's decision in *Witherspoon* and make an objection which under the law of Arkansas, as it stood at the time of his trial, could not conceivably have been sustained. *O'Connor* v. *Ohio*, 385 U.S. 92 (1966).

II.

This Court Cannot Properly Affirm the Decision elow, Which Would Send Petitioner to His Death Pur- uant to the Verdict of an Unconstitutionally Selected ury.

There remains to be considered the question whether his Court can take notice of the plain unconstitutionality f petitioner's death sentence under *Witherspoon,* in view f the circumstance that no *Witherspoon* contention was rged in his petition for habeas corpus, or in his appeal elow, or in his petition for *certiorari* here. The answer o that question is controlled by *Boulden* v. *Holman.* Boulden came to this Court in a procedural posture iden- cal to petitioner's; the Court held that the proper dispo- ition of his case, in view of the *Witherspoon* violation pparent at his trial, was a remand to the district court where the issue that has belatedly been brought to our ttention may be properly and fully considered." 394 U.S., t 485.

Such a disposition would be all the more appropriate efe—were there no other grounds upon which the judg- ent of the court of appeals below should be reversed See Part III, *infra*)—in light of the history of proceed- ngs in the present matter. Petitioner Maxwell has been n the lip of death before, and should not cruelly be placed ere again, at least after the unconstitutionality of his eath sentence has become apparent. In the instant fed- ral habeas corpus proceeding—petitioner's second—insti- uted on July 21, 1966 (App. 2), the federal district court eclined to stay petitioner's execution then set for Sep- ember 2, 1966 (App. 2, 12), instead undertaking to hear

and decide the issues raised by his petition prior to the execution date. (See App. 17.) The court denied the petition on August 26, and simultaneously declined to issue a certificate of probable cause or a stay of execution pending appeal. (App. 41.) A Circuit Judge of the Eighth Circuit having denied applications for a certificate and a stay, it remained for Mr. Justice White to save petitioner's life by issuing a stay on September 1, 1966, one day before his scheduled execution.

In denying stays, the judges below were doubtless affected by the consideration that this was not petitioner's first resort to the federal courts. Circuit Judge Matthes, indeed, rested his refusal to stay the execution expressly on the ground that Maxwell's was a repeater petition. If petitioner were now to be remitted to a third federal habeas corpus proceeding, necessary stays might be at least as difficult to obtain as they were in the second. In its pretrial conference order in the present stage of the proceedings, the district court wrote:

> "Counsel for Maxwell are now cautioned that if they know of any other constitutional grounds on which his conviction and sentence may be subject to attack, they should advance those grounds in this proceeding since this Court would be most reluctant to consider in some subsequent proceeding any ground of attack which could have been raised in this proceeding." (App. 17.)

We could not and we certainly do not quarrel with this admonition of the district court, which was manifestly fair and proper. But *Witherspoon* has supervened; the application of the admonition to the grounds given peti-

tioner by *Witherspoon* is unclear; for this reason, a remand such as was ordered in *Boulden* seems particularly fitting. Remand would be fitting, that is, if—as we have said—there were no other grounds upon which the judgment below should be reversed.

III.

The Court Should Not, by Reason of *Witherspoon's* Supervention, Refuse to Decide the Issues Upon Which It Has Granted *Certiorari* Here.

Contrary to California's submission as *amicus curiae*, we believe that the conclusions reached in Parts I and II *supra*—that petitioner's death sentence is unconstitutional under *Witherspoon*, necessitating at the least a remand to the district court—do not require and should not properly lead this Court to refuse to decide the issues upon which *certiorari* was sought and granted herein. We state our reasons for this view:

First, the invalidity of petitioner's death sentence by force of *Witherspoon* does not render his other constitutional contentions moot in a technical sense. We do not consider what would be the case if petitioner were now before the Court on direct review of the judgment of the Arkansas courts imposing upon him the death sentence which he challenges on several distinct grounds. It might well be, in such a situation, that decision of one ground would moot the others. But that is not petitioner's posture.

This is a federal habeas corpus proceeding of the sort in which—as the Court recently recognized in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), and *Carafas* v. *LaVallee*, 391

U.S. 234 (1968)—relief other than outright release from confinement is both authorized and appropriate. If petitioner prevails on his federal constitutional claims, he will not thereby be entitled to an order requiring Arkansas to discharge him unconditionally, but rather to a conditional order of the kind now common in federal habeas corpus proceedings, commanding petitioner's release *unless* Arkansas retries or resentences him in a manner consistent with his constitutional rights as the federal court adjudicates them. If petitioner prevails on the *Witherspoon* ground alone, the appropriate federal order would require only his retrial by a jury selected conformably with *Witherspoon*; whereas if he prevails on his claims that other aspects of Arkansas' capital trial procedure are unconstitutional, the appropriate order would require relief from those unconstitutional procedures on any retrial. This difference in the outcome of the litigation depending upon the ground of decision makes plain that disposition of petitioner's case on *Witherspoon* grounds would not render his other claims technically moot. Cf. *Boulden v. Holman*, *supra*.

We are not, therefore, in an area where Article III restrictions upon the federal judicial power forbid this Court to decide the issues upon which it granted certiorari in December 1968. As to those issues, there remains a justiciable case and controversy between William I. Maxwell and the State of Arkansas. The question whether to decide the issues is plainly one within the scope of this Court's wise discretion—a discretion properly to be exercised in the light of the consequences of decision or non-decision both for the present parties and for others whose federal constitutional rights it is the purpose of the Court's certiorari jurisdiction to declare.

Second, then, we invite the Court's consideration of the following points, which we respectfully suggest should persuade it to exercise its undoubted discretion to adjudicate petitioner's constitutional challenges to Arkansas' procedure of allowing its juries arbitrary and lawless power to sentence to life or death in a single verdict capital trial:

(1) Petitioner Maxwell, following his trial under the challenged procedures, has now been on death row for more than seven years. If his case is disposed of on *Witherspoon* grounds alone, he will be subjected to a retrial for his life under the same procedures. It would surely be a work of the most exquisite cruelty to put him through another such trial if, as he claims, the procedures are unconstitutional. Nor does the State of Arkansas have any legitimate interest in conducting such a trial. If—as we are assuming—Arkansas' capital trial procedures are federally invalid, Maxwell will either survive long enough to upset the consequences of such a trial or he will be executed before he can. The first upshot gains Arkansas nothing; the second, nothing to which it is entitled.

(2) There are, to our knowledge, more than two dozen capital cases pending in this Court on petitions for *certiorari* raising one or both of the two constitutional issues upon which review was granted in the present case.[1] Post-conviction proceedings on behalf

[1] *Maggio v. New Jersey*, 69 T. 1969, No. 12 Misc.; *McGautha v. [illegible]*, 69 T. 1969, No. 16 Misc.; *Pinzella and Pinzella v. [illegible]*, 69 T. 1969, No. 18 Misc.; *Childs v. North Carolina*, 1969, No. 25 Misc.; *Sims v. Pigman*, 69 T. 1969, No. 38 Misc.; *[illegible] et al. v. California*, 69 T. 1969, No. 69 Misc.; *Negron [illegible]*, 69 T. 1969, No. 76 Misc.; *Jacobs v. Pigman*, 69 T. 1969, No. 112 Misc.; *Mayford v. Hocker*, 69 T. 1969, No. 229 Misc.

of more than a hundred other condemned men, raising the same issues, are pending in the lower courts.[1] For many of the condemned men, these issues are the only legal contentions now available in bar of their electrocutions and gassings.

[1] If the Court should decide the present case without resolving these issues, it might, of course, grant review in one or more of the other pending cases. But none of those cases presents the issues any more squarely or concretely than does petitioner's case; in none are the parties more sharply adverse; and petitioner's case has the distinct advantages (1) that the issues of state law and practice whose understanding is necessary to a proper formulation of the federal constitutional questions involved have been thoroughly

Smith v. *Nelson*, 0 T. 1969, No. 242 Misc.; *Reeves* v. *California*, 0 T. 1969, No. 243 Misc.; *Massey* v. *California*, 0 T. 1969, No. 329 Misc.; *Branum* v. *California*, 0 T. 1969, No. 332 Misc.; *Adams* v. *California*, 0 T. 1969, No. 341 Misc.; *Robinson* v. *California*, 0 T. 1969, No. 481 Misc.; *Arechiga* v. *Eyman*, 0 T. 1969, No. 287 Misc.; *Hill* v. *Patterson*, 0 T. 1969, No. 17 Misc.; *Smith and Higgins* v. *Washington*, 0 T. 1969, No. 113 Misc.; *Parmelee* v. *Georgia*, 0 T. 1969, No. 643 Misc.; *Hurst* v. *Illinois*, 0 T. 1969, No. 652; *Talbert* v. *California*, 0 T. 1969, No. 306 Misc.; *Wright and Aiken* v. *Washington*, 0 T. 1969, No. 281 Misc.; *Hall* v. *California*, 0 T. 1969, No. 503 Misc.; *Jaggers* v. *Kentucky*, 0 T. 1969, No. 122 Misc.; *Quintana* v. *Texas*, 0 T. 1969, No. 210 Misc.

[1] E.g., *Elderly* v. *Wainwright*, M.D. Fla., No. 67-98-Civ-J, a class-action habeas corpus proceeding raising these issues on behalf of the more than 60 inmates of Florida's death row; *Hall et al.* v. *Nelson*, N.D. Cal., No. 43438, described in Petition for Writ of Certiorari in *Anderson et al.* v. *California*, 0 T. 1969, No. 641 Misc., p. 8, n. 4.

Except, of course, the contention which this Court did not reach last term in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), that the death penalty is a "cruel and unusual punishment" prohibited by the Eighth and Fourteenth Amendments.

treated in the opinions below; (2) that this case has already been fully briefed and argued, and set to be reargued; and (3) that the Court has been favored by briefing and argument herein on behalf of the State of California as well as the State of Arkansas, in defense of their common practices. The time required to bring another case thus to the point of decision would only delay resolution of the question of the constitutionality of the commonly used capital trial practices which petitioner challenges, during which period of delay further constitutionally assailable capital trials would have been had.

(4) On the other hand, if the present case is disposed of solely on the *Witherspoon* ground, the Court might decide to decline review in the other pending cases raising the questions on which *certiorari* was granted here. With all deference, such a decision could only be characterized as incredibly heedless of human life. For, still more than when the Court agreed to hear these questions in December of 1968, large numbers of lives depend immediately and totally upon their prompt and proper resolution by the Supreme Court of the United States. This is so because, within the past year, the highest courts of several of the States having the largest death row populations in the Nation have rejected the precise federal constitutional contentions [illegible] two federal courts of appeals

[illegible] *McGautha v. State*, Ala. [illegible], 211 So. 2d 873 (1968), and *Maxwell v. State*, Ala. [illegible], 210 So. 2d 280 (1968), reject both standards and split-verdict contentions); *In re Anderson*, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 446 P. 2d 117 (1968) (re standards contention; California has split verdict procedure by statute); *Wainwright v. State*, 225 So. 2d 321 (Fla. 1969) (re standards contention; the Florida Supreme Court re-

having territorial jurisdiction over some of those States (in addition to the court below) have also rejected the contentions.[11] In these States and others, counsel for condemned men have been able to secure stays of execution, during recent months, only because of the pendency of this *Maxwell* case.[12] If *Maxwell* leaves unresolved the basic issues which it raises—and unless *certiorari* is, at the same time, granted on those issues in some other case—it is an unescapable prediction that dozens of human beings will die before this Court has another chance to pass upon the validity of their federal constitutional objections to their sentences of death.

(5) The matter might take on a different aspect if, by disposing of the present case on *Witherspoon*

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jected the "split verdict" contention in *Craig* v. *State*, 179 So. 2d 202 (Fla. 1965); *Miller* v. *State*, 224 Ga. 627, 163 S.E. 2d 73 (1968) (rejects both "standards" and "split-verdict" contentions); *Duncan* v. *State*, 441 S.W. 2d 688 (Mo. 1969) (rejects standards contention); *Howard* v. *State*, ——— Nev. ———, 455 P. 2d 34 (1969) (rejects "standards" contention); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968) (rejects both "standards" and "split-verdict" contentions); *State* v. *Crampton*, 18 Ohio St. 2d 187, 248 N.E. 2d 614 (1969) (rejects "standards" contention); *Hunter* v. *State*, ——— Tenn. ———, 440 S.W. 2d 1 (1969) (rejects "standards" contention); *Smith* v. *State*, 437 S.W. 2d 835 (Tex. Cr. App. 1969) and *Quintana* v. *State*, 441 S.W. 2d 191 (Tex. Cr. App. 1969) (reject "standards" contention; Texas now has statutory split-verdict procedure); *State* v. *Smith*, ——— Wash. 2d ———, 446 P. 2d 571 (1968) (rejects both "standards" and "split-verdict" contentions).

[11] *Sims* v. *Eyman*, 405 F. 2d 439 (9th Cir. 1969) (rejects both "standards" and "split-verdict" contentions); *Segura* v. *Patterson*, 388 F. 2d 849 (10th Cir. 1968) and *Bell* v. *Patterson*, 403 F. 2d 394 (10th Cir. 1968) (reject both "standards" and "split-verdict" contentions).

[12] See the Brief Amicus Curiae on Behalf of Robert Page Anderson, Frederick Satterfield, Walter C. Hines, Dorman Lee Talbot and Gerald Albert Beiryenan, filed herein.

grounds, the Court could expect to lay to rest any substantial number of these death cases. But the *Witherspoon* decision has been so badly crippled and contorted by ungenerous lower court constructions, which have invoked so many differing devices to defeat its effective implementation, that the restoration of *Witherspoon* to constitutional vigor could not conceivably be worked by any holding possible on the present record. We describe in Appendix C, *infra*, how *Witherspoon* has fared in the lower courts. As we have pointed out in Part I, *supra*, several of the most significant doctrines invoked to defeat it are not involved in petitioner Maxwell's case, and their permutations are so varied that their correction by this Court would require consideration of numerous cases exhibiting differing *voir dire* patterns and patterns of appellate reasoning. Meanwhile, as *Witherspoon* is consistently constricted by the state appellate courts, stays of execution based on *Witherspoon* claims are becoming increasingly difficult to secure—even in cases where, as is frequently not the situation, there exists a transcript of the *voir dire* examination that can be examined and made the basis of a post-conviction petition prior to a scheduled execution date.[1] Finally, in an appreciable number of death cases where stays of execution have been granted on the basis of the issues presented to this Court by petitioner Maxwell, no viable *Witherspoon* claim exists.[2]

[1] See the *Pinnello* case, in Petition for a Writ of Certiorari, *Pinnello and Pinnello v. New Jersey*, OT 1969, No. 18 Misc.; see also *Eskew v. State*, Ala. , 221 So. 2d 689 (1969).

[2] Unless, of course, this Court should undertake to decide the issue it expressly reserved in *Witherspoon*, whether any sort of

CONCLUSION

Petitioner Maxwell's death sentence is invalid under *Witherspoon v. Illinois*. But his controversy with the State of Arkansas does not stop there. Arkansas has sentenced petitioner to die, kept him on death row for seven years, once brought him within twenty-four hours of execution, and now threatens him with a retrial for his life—if his present sentence is vacated on *Witherspoon* grounds—pursuant to capital sentencing procedures whose conceded arbitrariness makes a mockery of the most rudimentary principles of constitutional due process.

More than four hundred men on the death rows of this Nation have been condemned to be electrocuted, gassed, or hanged pursuant to similar arbitrary procedures. Their lives have been held forfeit by a selective decisional process so lawless that no court sitting to enforce the Constitution's vaunted rule of law could for a moment countenance a like sort of decisional process for the disposition of any other issue, criminal or civil, consequential or trivial, committed by law to resolution by a legal tribunal. See the Brief for Petitioner herein, pp. 11-65.

The lives of many of these men now depend entirely upon this Court's timely consideration and proper adjud-

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death qualification of capital juries is constitutional. Significantly, the lower courts have without exception treated *Witherspoon* as approving the narrow form of death qualification whose validity the *Witherspoon* opinion was at pains not to determine. See cases cited in Appendix I, *infra*. But the present case offers a fitting vehicle for considering that question, since the plain *Witherspoon* requirements were not met here.

cation of the question of constitutionality of that arbitrary process. We urge the Court to decide the question now, and to strike the process down.

Respectfully submitted,

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APPENDIX A

Voir Dire Examination of Seven Veniremen Excused for Opposition to the Death Penalty

r. 116] -[*By the Court*:]

Does any other person have any reason why they can't become jurors?

Alright, Mr. Whittington, you may ask.

MR. WHITTINGTON [the prosecutor]: Mr. Kimball, the evidence convinced you beyond a reasonable doubt at conclusion of this trial that the defendant was guilty, t you thought a death sentence was justified, do you e any conscientious scruples that prevent your impos such a sentence?

A. No.

Tr. 117] Q. Mrs. Kanada, if you were convinced be- d a reasonable doubt at the conclusion of this trial that defendant was guilty, that you thought a death sen- ce was justified, would you have any conscientious uples about imposing the death sentence?

A. No sir.

Q. Mr. Groom, you have heard the question I just sed, do you entertain any such conscientious scruples inst the death sentence?

A. No.

Q. Mr. Martin, do you entertain any such scruples?

A. No.

Q. Mr. Beavers?

A. No, not at this point.

Q. Do you entertain any conscientious scruples about posing the death penalty?

A. No.

Q. Mr. Rima?

A. No.

Q. Mr. McCleary?

A. Yes. I am afraid I do.

Q. I submit, your Honor, that Mr. McCleary should be excused.

THE COURT: Alright, Mr. McCleary.

LET THE RECORD SHOW I EXCUSED, AGAINST DEATH-SENTENCE.

. . . . . .

[Tr. 159] MR. WHITTINGTON:

Q. Mrs. Wade, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you felt the crime he committed was proved beyond a reasonably doubt and was so abhorent as to justify the death penalty would you have any conscientious scruples against the death penalty?

A. I would not sentence the death penalty.

MR. WHITTINGTON: I submit, your Honor, that Mrs. Wade should be excused.

LET THE RECORD SHOW MRS. WADE EXCUSED. DOES NOT BELIEVE IN THE DEATH PENALTY.

. . . . . .

[Tr. 160] MR. WHITTINGTON:

Q. Mrs. Hagy, if you were convinced beyond a reasonable doubt of the guilt of the defendant and you thought that this crime was so abhorent as to justify the death penalty would you entertain any conscientious scruples about inflicting the death sentence?

A. I don't believe in capitol punishment.

Q. You do not believe you could return a verdict of capitol punishment?

A. No sir, I don't believe in capitol punishment.

THE COURT: You will be excused.

LET THE RECORD SHOW MRS. HAGEY EXCUSED, DOES NOT BELIEVE IN CAPITOL PUNISHMENT.

. . . . . .

[Tr. 171] MR. WHITTINGTON:

Q. Mrs. Stroupe, . . .

. . . . . .

Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capitol punishment that might prevent you from returning such a verdict?

A. I think I do.

MR. WHITTINGTON: I submit, your Honor, that the juror should be excused.

THE COURT: You may be excused.

LET THE RECORD SHOW MRS. STROUPE EXCUSED, AGAINST THE DEATH PENALTY.

. . . . . .

[Tr. 178] MR. WHITTINGTON:

Q. Mrs. Breland, if you were convinced that the defendant was guilty beyond a reasonable doubt at the end of this trial and that his actions had been so shocking and abhorent as to warrant the death penalty do you have any feelings about capitol punishment to prevent your returning such [Tr. 179] a verdict?

A. Yes, I think I do.

MR. WHITTINGTON: I submit, your Honor, that Mrs. Breland be excused.

THE COURT: You may be excused.

LET THE RECORD SHOW MRS. BRELAND EXCUSED, DOES NOT BELIEVE IN CAPITOL PUNISHMENT.

. . . . . .

[Tr. 181] MR. WHITTINGTON:

Q. Mr. Adams, do have any feeling concerning capitol punishment that would prevent you or make you have any feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?

A. No, I don't believe in capitol punishment.

THE COURT: You will be excused Mr. Adams.

LET THE RECORD SHOW MR. ADAMS EXCUSED, DOES NOT BELIEVE IN CAPITOL PUNISHMENT.

. . . . . .

[Tr. 195] MR. WHITTINGTON:

Q. Mr. McAdams, do you have any conscientious scruples against capitol punishment?

A. I don't have scruples, I have convictions.

[Tr. 196] Q. What are they?

A. I am against capitol punishment.

THE COURT: You will be excused, Mr. McAdams.

LET THE RECORD SHOW MR. McADAMS EXCUSED, AGAINST CAPITOL PUNISHMENT.

. . . . . .

APPENDIX B

Voir Dire Examination of Venireman Rephan

[Tr. 164] MR. WHITTINGTON: Q. Mr. Rephan, . . .

. . . . . .

Mr. Mercer [defense counsel]: . . .

. . . . . .

[Tr. 166] Q. The Court will so instruct you if you are selected as a juror that it is the defendant's right not to take the witness stand if he so desires. Would the fact that this defendant would not take the stand as he so desires tend to cause you to believe that he might have something to hide, and therefore might be guilty?

A. I don't know how to answer that.

Q. The Court will instruct you that the defendant is presumed innocent until proven guilty beyond a reasonable doubt and that this presumption follows him throughout the trial. Now, say that the defendant did not desire to take the witness stand on his behalf, would this fact tend to cause you to give more credibility to the State's testimony and evidence and raise a presumption in your mind that the defendant might have something to hide?

A. It might. I really don't know, I can't say.

THE COURT: That is the first time that point has [Tr. 167] been raised here, as to whether or not the defendant might take the stand. I will say this to all the jurors, each of you at all times at arriving at a verdict base that verdict solely upon the law and will you be governed by the law as given to you by the Court? Will each one of you do that? If there isn't anyone who will do that I want to know it now. And using the law as given to you by the

Court and the evidence from the witness stand, will you base your verdict upon those two things, the law and the evidence? In other words, Mr. Rephan, if it becomes necessary and the Court does instruct you on whether or not the defendant takes the witness stand, will you in arriving at a verdict base your decision upon that law and not any opinion that you have?

A. Yes sir.

THE COURT: Proceed Mr. Mercer.

Q. You are saying you would not hold this against him?
A. There is a possibility that I might, that is hard to say.
Q. There is a possibility that it might?
A. That is hard to say.
Q. Pass the witness.

MR. WHITTINGTON:

Q. Mr. Rephan, if you are instructed by the Court as to the law of this case and the Court told you that you could not make anything from the fact that someone did not take the stand would you be able to follow that instruction and would you be able to put out of your mind any personal [Tr. 168] feeling that you might have, or any conclusion that you might draw from that act, and abide by that instruction given to you by the Court?

A. Yes sir.
Q. Do you feel you could give the defendant a fair trial?
A. I do.
Q. You don't have any prejudices that might affect your ability to give this defendant a fair trial?
A. I don't think I do.
Q. You would do your utmost to give him a fair trial?
A. Yes sir.

THE COURT: Mr. Rephan, you stated there that you thought you could do that. If it develops in this case and the Court would give an instruction whether or not the defendant does take the stand, which if the defendant does not take the stand the Court will give an instruction, would you substitute your feelings and your opinion for the instruction of the Court or would you be guided by the Instructions of the Court?

A. I would follow the instructions of the Court.

I want you to be sure of that, Mr. Rephan. This is very important as to whether or not at this time you feel if the defendant does not take the stand if you feel you might be just a little bias or prejudice against him because he didn't take the stand? I want you to be sure about that.

[Tr. 169] A. I can't be sure about it.

THE COURT: You would be the only one who would know, I wouldn't.

Q. I would abide by the law I am sure.

THE COURT: In other words, you would not substitute your opinion or feelings against what the Court told you the law was?

A. No sir.

.....

APPENDIX C

Treatment of *Witherspoon* v. *Illinois* by the Lower Courts

This appendix includes all of the cases we have found in which *Witherspoon* has been applied by the lower courts.[1]

A. *Decisions setting aside death sentences.*[2]

The California and Georgia Supreme Courts have each set aside a number of death sentences under *Witherspoon*, and a few other state courts have set aside a few. In each case, the death sentence was not definitively excluded by the court's decision; rather a new trial was ordered either of the issue of penalty alone (as in California and Georgia) or of the issues of guilt *and* penalty (as in Louisiana and Texas). It is interesting to note that the Georgia Supreme

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[1] Excepting only cases involving sentences less than death where a lower court has done no more than correctly to note that *Witherspoon* does not affect non-death cases.

[2] A number of decisions are reported in which federal habeas corpus courts have remanded death cases to the state courts for initial determination of a *Witherspoon* claim. *Brent* v. *White*, 398 F. 2d 503 (5th Cir. 1968); *Powers* v. *Hauck*, 399 F. 2d 322 (5th Cir. 1968); *Irving* v. *Breazeale*, 402 F. 2d 231 (5th Cir. 1968); *Garrison* v. *Patterson*, 405 F. 2d 696 (10th Cir. 1969). Cf. *Shinall* v. *Breazeale*, 404 F. 2d 785 (5th Cir. 1968) (remand to the district court). In the only one of those cases with which we are familiar, the State court thereafter rejected the *Witherspoon* ground. *Brent* v. *White*, 19th Judicial District Ct. of La., Crim. Div., No. 47,265, decided July 31, 1969.

In three cases known to us, federal courts have actually vacated death sentences under *Witherspoon*. *Spencer* v. *Beto*, 398 F. 2d 500 (5th Cir. 1968); *Williams* v. *Dutton*, 400 F. 2d 797 (5th Cir. 1968); *Rideau* v. *White*, E.D. La., Baton Rouge Div., Misc. No. 970, decided May 12, 1969.

Court has remanded for retrials as to penalty alone—thus inaugurating a system of separate trials of the penalty issue to avoid either definitive invalidation of a death sentence or an entirely new trial under *Witherspoon*—although that court has steadfastly maintained that separate penalty proceedings are impermissible under Georgia law whenever confronted with constitutional challenges to the single-verdict capital trial such as that made herein by petitioner Maxwell. See *Miller* v. *State*, 224 Ga. 627, 163 S.E. 2d 730 (1968).

In each decision vacating a death sentence and remanding for a new trial, the court has directed that jurors on retrial be death-qualified by the standards whose constitutionality was *reserved* in *Witherspoon*. Thus, *Witherspoon* has invariably been incorrectly read as *validating* the forms of death-qualification practice which it did not expressly *invalidate*—or, at the least, the state courts have proved absolutely unwilling to reconsider the validity of those forms in light of the logic and reasoning of the *Witherspoon* opinion.[3]

See:

In re Anderson and Saterfield, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 446 P. 2d 117 (1968)

People v. *Risenhoover*, 70 Adv. Cal. 15, 73 Cal. Rptr. 553, 447 P. 2d 925 (1968)

People v. *Bradford*, 70 Adv. Cal. 347, 74 Cal. Rptr. 726, 450 P. 2d 46 (1969)

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[3] See Petition for a Writ of Certiorari, *Forcella and Funicello* v. *New Jersey*, O.T. 1969, No. 18 Misc., pp. 69-74; Petition for a Writ of Certiorari, *Anderson et al.* v. *California*, O.T. 1969, No. 60 Misc., pp. 52-57; and Mr. Justice Peters' dissenting opinion in *People* v. *Tolbert*, 70 Adv. Cal. 844, 867, 76 Cal. Rptr. 445, 458, 452 P. 2d 661, 674 (1969).

People v. *Sears,* 70 Adv. Cal. 485, 74 Cal. Rptr. 872, 450 P. 2d 248 (1969)

In re Mathis, 70 Adv. Cal. 501, 74 Cal. Rptr. 914, 450 P. 2d 290 (1969)

People v. *Teale,* 70 Adv. Cal. 532, 75 Cal. Rptr. 172, 450 P. 2d 564 (1969)

People v. *Fain,* 70 Adv. Cal. 625, 75 Cal. Rptr. 633, 451 P. 2d 65 (1969)

People v. *Morse,* 70 Adv. Cal. 762, 76 Cal. Rptr. 391, 452 P. 2d 607 (1969)

People v. *Osuna and Gorman,* 70 Adv. Cal. 811, 76 Cal. Rptr. 462, 452 P. 2d 678 (1969)

People v. *Goodridge,* 70 Adv. Cal. 878, 76 Cal. Rptr. 421, 452 P. 2d 637 (1969)

In re Eli, 71 Adv. Cal. 227, 77 Cal. Rptr. 665, 454 P. 2d 337 (1969)

People v. *O'Brien,* 71 Adv. Cal. 415, 78 Cal. Rptr. 202, 455 P. 2d 138 (1969)

People v. *Vaughn,* 71 Adv. Cal. 423, 78 Cal. Rptr. 186, 455 P. 2d 122 (1969)

People v. *Quicke,* 71 Adv. Cal. 521, 78 Cal. Rptr. 683, 455 P. 2d 787 (1969)

In re Seiterle, 71 Adv. Cal. 722, 78 Cal. Rptr. 857, 456 P. 2d 129 (1969)

People v. *Ketchel,* 71 Adv. Cal. 659, 79 Cal. Rptr. 92, 456 P. 2d 660 (1969)

People v. *Williams,* 71 Adv. Cal. 637, 79 Cal. Rptr. 65, 456 P. 2d 633 (1969)

People v. *Schader,* 71 Adv. Cal. 797, —— Cal. Rptr. ——, —— P. 2d —— (1969)

People v. *Stanworth,* 71 Adv. Cal. 858, —— Cal. Rptr. ——, —— P. 2d —— (1969)

People v. *Gardner,* 71 Adv. Cal. 882, —— Cal. Rptr. ——, —— P. 2d —— (1969)

In Re Hillery, 71 Adv. Cal. 896, —— Cal. Rptr. ——, —— P. 2d —— (1969)

Miller v. *State*, 224 Ga. 627, 163 S.E. 2d 730 (1968)
Dixon v. *State*, 224 Ga. 636, 163 S.E. 2d 737 (1968)
Massey v. *Smith*, 224 Ga. 721, 164 S.E. 2d 786 (1968)
Arkwright v. *Smith*, 224 Ga. 764, 164 S.E. 2d 796 (1968)
Williams v. *Smith*, 224 Ga. 800, 164 S.E. 2d 798 (1968)
Jones v. *State*, 224 Ga. 782, 164 S.E. 2d 831 (1968)
Alexander v. *State*, —— Ga. ——, 168 S.E. 2d 315 (1969)
State v. *Turner*, 220 So. 2d 67 (La. 1969)
State v. *Benjamin*, 222 So. 2d 853 (La. 1969)
Rouse v. *State*, —— Miss. ——, 222 So. 2d 145 (1969)
State v. *Spence*, 274 N.C. 536, 164 S.E. 2d 593 (1968)
Ellison v. *State*, 432 S.W. 2d 955 (Tex. Cr. App. 1968)
Ex parte Bryan, 434 S.W. 2d 123 (Tex. Cr. App. 1968)[4]

B. *Decisions refusing to set aside death sentences*

In all cases found other than those just cited, lower courts have discovered some means to avoid *Witherspoon*. We attempt below to categorize the rules and doctrines in avoidance.

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[4] See also *Evans* v. *State*, 430 S.W. 2d 502 (Tex. Cr. App. 1968), reversing for failure of the trial court to have *voir dire* examination transcribed on request; *Aaron* v. *State*, 283 Ala. 52, 214 So. 2d 327 (1968), remanding for consideration of the *Witherspoon* issue by the trial court.

1. *Doctrines distinguishing or "construing" Witherspoon*:

a. *The "different atmosphere" doctrine.* The *Witherspoon* decision is said to rest entirely on the fact that the trial judge in that case *rushed* to sweep the jury of conscientious objectors. Cases in which the presiding judge is more deliberate on the *voir dire*—albeit equally effective in excluding the same veniremen—present a "different atmosphere." In cases with a "different atmosphere," the precise, carefully articulated standards whose elaboration comprises the bulk of the *Witherspoon* opinion are said to be simply "not binding" on state courts. *People* v. *Speck*, 41 Ill. 2d 177, 227, 242 N.E. 2d 208 (1968). See also *People* v. *Mallett*, —— Ill. 2d ——, 244 N.E. 2d 129 (1969); *People* v. *Moore*, 42 Ill. 2d 73, 246 N.E. 2d 299 (1969); *Jaggers* v. *Commonwealth*, 439 S.W. 2d 580 (Ky. 1968); *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968); *Brent* v. *White*, 19th Judicial District Ct. of La., Crim. Div., No. 47,265, decided July 31, 1969. *Cf. Bell* v. *Patterson*, 402 F. 2d 394 (10th Cir. 1968).

b. *The "different statute" doctrine.* The highest courts of three States have purported to distinguish *Witherspoon* in whole or in part upon the ground that their state statutes differ from Illinois' in that their statutes disqualify only jurors whose scruples would prevent them from finding the defendant *guilty*. *Wilson* v. *State*, 225 So. 2d 321 (Fla. 1969); *Williams* v. *State*, Fla. Sup. Ct., No. 37,316, decided April 23, 1969; *Howard* v. *State*, —— Nev. ——, 446 P. 2d 163 (1968) (dictum); *Koonce* v. *State*, Okla. Ct. Crim. App., No. A-14,826, decided May 21, 1969. These stat-

utes are, of course, of the sort which the *Witherspoon* opinion noted are sometimes not construed as meaning what they say (391 U.S., at 513-514, n. 5, citing Florida and Nevada decisions); and, in fact, in all three States the statutes have been consistently read—both before and after the explanation that they squared with *Witherspoon* because directed to "guilt"-qualification—as allowing disqualification of jurors whose scruples would affect only their votes on penalty, not guilt. *Piccott* v. *State*, 116 So. 2d 626 (Fla. 1959); *Pitts* v. *State*, 185 So. 2d 164 (Fla. 1966); *Sims* v. *State*, 184 So. 2d 217 (Fla. Dist. Ct. App. 1966); and see the *voir dire* practice reflected in *Abram* v. *State*, 216 So. 2d 498 (Fla. Dist. Ct. App. 1968). *State* v. *Williams*, 50 Nev. 271, 257 Pac. 619 (1927); *Spillers* v. *State*, —— Nev. ——, 436 P. 2d 18 (1968); *Walker* v. *State*, —— Nev. ——, 455 P. 2d 34 (1969). And see the exclusions sustained in the *Koonce* case itself.

c. *The doctrine that* Witherspoon *could not have been intended to deprive the prosecution of an "impartial" jury on the question of penalty; that a juror's "impartiality" must appear affirmatively; therefore, that exclusion of equivocal veniremen is proper.* This doctrine, which stands the "unmistakably clear" formulation of *Witherspoon* on its head, began with *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968). See also *Williams* v. *State*, Fla. Sup. Ct., No. 37,316, decided April 23, 1969; *Campbell* v. *State*, Fla. Sup. Ct., No. 35,622, decided June 11, 1969; *State* v. *Atkinson*, —— N.C. ——, 167 S.E. 2d 241 (1968); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *cf. Davis* v. *State*, —— Ark. ——, 440 S.W. 2d 244 (1969); *Koonce* v. *State*, Okla. Ct. Crim. App., No. A-14,826, decided

May 21, 1969. But see *People* v. *Chacon*, —— Cal. 2d ——, 73 Cal. Rptr. 10, 447 P. 2d 106 (1968); *People* v. *Osuna and Gorman*, *supra*.

d. *The doctrine construing* Witherspoon *to permit disqualification of a juror who would not vote for the death penalty in the particular case being tried, although he could vote for death in another sort of case.* See *Jaggers* v. *Commonwealth*, 439 S.W. 2d 580 (Ky. 1968); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968); *State* v. *Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *Smith* v. *State*, 437 S.W. 2d 835 (Tex. Cr. App. 1968). But see 391 U.S., at 522 n. 21.

(e. And the Maryland Court of Special Appeals has suggested that *Witherspoon* may have no application in that State, because a capital jury in Maryland merely *recommends* and does not *impose* the death sentence. *Veney* v. *State*, 251 Md. 182, 246 A. 2d 568 (1968). But see 391 U.S., at 518, n. 12; *id.*, at 522.)

2. *Methods of interpreting a* voir dire *transcript so as to avoid* Witherspoon:

a. *Distinguishing* Witherspoon *if the trial judge conducted any sort of inquiry going beyond general opposition to capital punishment.* The nature of the inquiry and of the juror's response are in this view apparently immaterial. *Segura* v. *Patterson*, 402 F. 2d 249 (10th Cir. 1968); *People* v. *Mallett*, —— Ill. 2d ——, 244 N.E. 2d 129 (1969); *State* v. *Pruett*, 18 Ohio St. 2d 167, 248 N.E. 2d 605 (1969) (*semble*).

b. *According deference to the trial court's interpretation of a venireman's responses in ruling on chal-*

lenges for cause. This constructional canon—proper enough in its place, of course—is consistently applied to the construction of *voir dire* proceedings conducted prior to the date of *Witherspoon*, at a time when the trial judge would not in fact have been using proper *Witherspoon* standards. The court that applies the canon usually does so in an opinion that retroactively rewrites the pre-*Witherspoon* law of the State as consistent with *Witherspoon*. *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968); *State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *State* v. *Aiken*, —— Wash. 2d ——, 452 P. 2d 232 (1969).

c. *Observing that "no particular form of words" is necessary to satisfy* Witherspoon. In practice, this means that most any form of words, however far from the mark, will satisfy *Witherspoon*. *People* v. *Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968); *Koonce* v. *State*, Okla. Ct. Crim. App. No. A-14,826, decided May 21, 1969; *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *State* v. *Aiken*, —— Wash. 2d ——, 452 P. 2d 232 (1969); *cf. People* v. *Varnum*, 70 Adv. Cal. 514, 75 Cal. Rptr. 161, 450 P. 2d 533 (1969).

3. *Methods of avoiding* Witherspoon *where jurors were unmistakably excluded in violation of the rule of that decision:*

a. *The determination that because only a few jurors were unconstitutionally excluded, the requisite representative quality of the jury was not destroyed.* *Bell* v. *Patterson*, 402 F. 2d 394 (10th Cir. 1968); *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968); *State* v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 N.E. 2d 607

(1969) (alternative ground, *semble*); *Scott* v. *State*, 434 S.W. 2d 678 (Tex. Cr. App. 1968). *Contra*: *People* v. *Fain*, 70 Adv. Cal. 625, 75 Cal. Rptr. 633, 451 P. 2d 65 (1969); *Miller* v. *State*, 224 Ga. 627, 163 S.E. 2d 730 (1968); pp. 22-24 *supra*.

b. *The observation that unexhausted prosecutorial peremptories outnumbered unconstitutionally excluded veniremen.* Announced as a "relevant makeweight" in *State* v. *Mathis*, 52 N.J. 238, 245 A. 2d 20 (1968), this consideration frequently appears as an alternative ground of decision. *Campbell* v. *State*, Fla. Sup. Ct., No. 35,622, decided June 11, 1969; *People* v. *Speck*, 41 Ill. 2d 177, 242 N.E. 2d 208 (1968); *People* v. *Mallett*, —— Ill. 2d ——, 244 N.E. 2d 129 (1969); *People* v. *Moore*, 42 Ill. 2d 73, 246 N.E. 2d 299 (1969); *State* v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969); *Scott* v. *State*, 434 S.W. 2d 678 (Tex. Cr. App. 1968). Except in the California Supreme Court, *In re Anderson*, 69 Cal. 2d 613, 73 Cal. Rptr. 21, 446 P. 2d 117 (1968); *People* v. *Sears*, 70 Adv. Cal. 485, 74 Cal. Rptr. 782, 450 P. 2d 248 (1969), no notice seems to be taken of the palpable unconstitutionality of a *conclusive judicial presumption* that the prosecutor will *systematically* employ his peremptories to exclude from the jury a class of persons that this Court has held cannot be excluded. But see *Swain* v. *Alabama*, 380 U.S. 202, 222-228 (1965).

c. *The observation that defense counsel did not object, or did not inquire further regarding the excluded jurors' attitudes, or did not express his dissatisfaction with the jury by exhausting his own peremptories.* This, also, is usually an alternative ground of decision. *State* v. *Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968);

State v. *Wigglesworth*, 18 Ohio St. 2d 171, 248 N.E. 2d 607 (1969); *Pittman* v. *State*, 434 S.W. 2d 352 (Tex. Cr. App. 1968); *Scott* v. *State*, 434 S.W. 2d 678 (Tex. Cr. App. 1968). *Contra*: the *Anderson* and *Sears* cases cited in the preceding paragraph.

d. *Miscellaneous procedural grounds*: *State* v. *Crook*, 221 So. 2d 473 (La. 1969); *Duisen* v. *State*, 441 S.W. 2d 688 (Mo. 1968); *Baker* v. *State*, 225 So. 2d 327 (Fla. 1969); *Lokos* v. *State*, —— Ala. ——, 221 So. 2d 689 (1969).

4. *Decisions articulating relatively unimpeachable* Witherspoon *standards but manifestly misapplying them*: *Segura* v. *Patterson*, 402 F. 2d 249 (10th Cir. 1968); *State* v. *Atkinson*, —— N.C. ——, 167 S.E. 2d 241 (1969). A common ground of misconstruction of the *voir dire* resides in taking literally a juror who says that his scruples will affect his ability to return a "guilty" verdict, although, in the context of the applicable state law, verdict forms and/or *voir dire* questioning, a "guilty" verdict means an *unqualified* guilty verdict—that is, a vote for the death penalty. See *Wilson* v. *State*, 225 So. 2d 321 (Fla. 1969); *Furman* v. *State*, —— Ga. ——, 167 S.E. 2d 628 (1969); *cf. State* v. *Forcella*, 52 N.J. 263, 245 A. 2d 181 (1968); *Veney* v. *State*, 251 Md. 182, 246 A. 2d 568 (1968). It should be noted that even the California Supreme Court, which has given the most generous reception to *Witherspoon* of any state court, permits disqualification of veniremen for scruples without instructing them that state law requires them as jurors to consider the death penalty, and then inquiring whether they are able to subordinate their scruples to this duty. *People* v. *Beivelman*, 70 Adv. Cal. 37, 73 Cal. Rptr. 521, 447 P. 2d 913 (1968); *People* v. *Durham*,

70 Adv. Cal. 179, 74 Cal. Rptr. 262, 449 P. 2d 198 (1969); *People* v. *Hill*, 70 Adv. Cal. 723, 76 Cal. Rptr. 225, 452 P. 2d 329 (1969); *People* v. *Varnum*, 70 Adv. Cal. 514, 75 Cal. Rptr. 161, 450 P. 2d 553 (1969); *People* v. *McGautha and Wilkinson*, 70 Adv. Cal. 823, 76 Cal. Rptr. 434, 452 P. 2d 650 (1969); *People* v. *Tolbert*, 70 Adv. Cal. 844, 76 Cal. Rptr. 445, 452 P. 2d 661 (1969); *People* v. *Coogler*, 71 Adv. Cal. 165, 77 Cal. Rptr. 790, 454 P. 2d 686 (1969); *People* v. *Nye*, 71 Adv. Cal. 376, 78 Cal. Rptr. 467, 455 P. 2d 395 (1969) (defense counsel's interrogation, in addition, was unduly restricted); *People* v. *Miller*, 71 Adv. Cal. 477, 78 Cal. Rptr. 449, 455 P. 2d 377 (1969).

5. *Opaque decisions*: In these cases refusing to vacate death sentences it is impossible to evaluate the application made of *Witherspoon*, since not enough appears from the respective opinions to appraise the courts' characterization of the *voir dire* (or relevant parts of it) as consistent with *Witherspoon* standards. *Sims* v. *Eyman*, 405 F. 2d 439 (9th Cir. 1969); *People* v. *Mabry*, 71 Adv. Cal. 448, 78 Cal. Rptr. 655, 455 P. 2d 759 (1969); *People* v. *Pike*, 71 Adv. Cal. 617, 78 Cal. Rptr. 672, 455 P. 2d 776 (1969); *Whisman* v. *State*, 224 Ga. 793, 164 S.E. 2d 719 (1968); *State* v. *Hudson*, 221 So. 2d 484 (La. 1969); *Walker* v. *State*, —— Nev. ——, 455 P. 2d 34 (1969); *State* v. *Crampton*, 18 Ohio St. 2d 182, 248 N.E. 2d 614 (1969); *Quintana* v. *State*, 441 S.W. 2d 191 (Tex. Cr. App. 1969); *State* v. *Smith*, —— Wash. 2d ——, 446 P. 2d 571 (1968).